No. 96-1179

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In the Supreme Court

OF THE

United States

October Term, 1996

INDICATED EXPANSION SHIPPERS,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT CALIFORNIA PUBLIC UTILITIES COMMISSION IN OPPOSITION

PETER ARTH, JR.
EDWARD W. O'NEILL
MARK FOGELMAN*

Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992
*Counsel of Record

Attorneys for Respondent California Public Utilities Commission

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the District of Columbia Circuit correctly concluded that the Federal Energy Regulatory Commission's ("FERC's") rendition of findings, conclusions and certificate conditions for the conceded sole purpose of coercing changes in the rates of a state-regulated Hinshaw pipeline was beyond its statutory authority. *See* 15 U.S.C. §717(c).

2. Whether the Indicated Expansion Shippers, the sole petitioners herein, having unsuccessfully argued before the California Public Utilities Commission ("CPUC") and the California Supreme Court that the FERC's findings and conclusions below were correct and required the alteration of the CPUC's rate orders and then having allowed those CPUC and California Supreme Court decisions to become final by not filing a petition for a writ of certiorari in this Court, are barred by the doctrines of collateral estoppel and res judicata from raising those claims before this Court on a new petition for a writ of certiorari.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

The PGT Expansion and the PG&E Expansion 1

The CPUC's Incremental Rate Policy 2

The FERC's Attempts to Coerce Changes in the CPUC's PG&E Expansion Rate Structure 3

Private Parties' Attempts to Use the FERC's Findings and Conclusions to Coerce Changes in the CPUC's Rate Structure 11

Proceedings in the Court of Appeals 13

ARGUMENT 15

I. None of the Considerations Warranting a Grant of Certiorari is Present in this Case 15

II. Should the Solicitor General Take a Position Other Than That Certiorari Should Be Denied, the CPUC Reserves the Right to Respond in a Supplemental Brief 17

III. The Petition for Certiorari Is Barred in Any Event by the Doctrines of Res Judicata and Collateral Estoppel 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 19

Consumers Lobby Against Monopolies v. Pub. Util. Comm'n, 25 Cal.3d 891 (1979) 18

Detroit & Mackinac Ry. Co. v. Michigan Railroad Comm'n, 235 U.S. 402 (1914) 19

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) 19

General Motors Corp. v. Tracy, 65 U.S.L.W. 4086 (Feb. 18, 1997) 15

Haring v. Prosise, 462 U.S. 306 (1983) 19

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 19

Migra v. Warren City School District, 465 U.S. 75 (1984) 19

Mobil Oil Corp. v. FERC, 886 F.2d 1023 (8th Cir. 1989) 11

Napa Valley Electric Co. v. Railroad Comm'n of California, 251 U.S. 366 (1920) 18

Norcen Energy Resources, Ltd. v. Pacific Gas and Electric Co., No. C-94-0911-VRW (N.D. Cal.) 13

Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n of California, 600 F.2d 1309 (9th Cir. 1983), cert. denied, 444 U.S. 920 (1979) 18

Panhandle Eastern Pipe Line Corp. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) 15

People v. Western Air Lines, 42 Cal.2d 621, appeal dismissed, 348 U.S. 859 (1954) 18

TABLE OF AUTHORITIES – Continued

Page

Southern Pacific Transp. Co. v. Pub. Util. Comm'n of California, 716 F.2d 1285 (9th Cir. 1983), cert. denied, 466 U.S. 936 (1984) 18

Sunray Oil Co. v. FPC, 364 U.S. 137 (1960) 15

United Distribution Companies v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), petitions for cert. docketed, Nos. 96-1186, 96-1187, 96-1188, 96-1189, 65 U.S.L.W. 3575-76 (Feb. 18, 1997) 16

FERC Decisions

Altamont Gas Transmission Co., 53 FERC ¶ 61,395 (1991) 5

Pacific Gas Transmission Co., 54 FERC ¶ 61,035 (1991) 3

Pacific Gas Transmission Co., 56 FERC ¶ 61,192 (1991) 1, 5

Pacific Gas Transmission Co., 57 FERC ¶ 61,097 (1991) 9

Pacific Gas Transmission Co., 62 FERC ¶ 61,243 (1993) 10

Pacific Gas Transmission Co., 64 FERC ¶ 61,052 (1993) 11

Pacific Gas Transmission Co., 68 FERC ¶ 61,197 (1994) 13

Suncor, Inc. v. Pacific Gas Transmission Co., 67 FERC ¶ 61,352 (1994) 12

TABLE OF AUTHORITIES – Continued

Page

CPUC DECISIONS

D.90-02-016, Re Interstate Natural Gas Pipeline Supply and Capacity, 35 Cal.P.U.C.2d 196, 110 P.U.R.4th 486 (1990) 2

D.90-12-119, Re Pacific Gas and Electric Co., 39 Cal.P.U.C.2d 69 (1990) 1, 3

D.91-06-017, Re Pacific Gas and Electric Co., 40 Cal.P.U.C.2d 497 (1991) 4, 8

D.91-06-053, Re Pacific Gas and Electric Co., 40 Cal.P.U.C.2d 628 (1991) 4, 8

D.92-10-056, Re Pacific Gas and Electric Co., 46 Cal.P.U.C.2d 199 (1992) 2, 9, 11

D.93-02-018, Re Pacific Gas and Electric Co., 48 Cal.P.U.C.2d 162 (1993) 11

STATUTES

15 U.S.C. §717(c) 5, 15

28 U.S.C. §1738 19

Cal. Pub. Util. Code §1709 18

COURT RULES

U.S. Sup. Ct. R. 12.6 17

U.S. Sup. Ct. R. 13 17

U.S. Sup. Ct. R. 15.8 18

STATEMENT OF THE CASE

The PGT Expansion and the PG&E Expansion

The Pacific Gas Transmission Company/Pacific Gas and Electric Company ("PGT/PG&E") Expansion Project consisted of two separate proposals – a proposal to the FERC to expand PGT's interstate natural gas transmission facilities from Canada to the California/Oregon Border at Malin and a separate but related proposal to the CPUC to expand PG&E's intrastate California gas transmission facilities from Malin to Kern River Station in Southern California. The PGT interstate certificate application was considered by the FERC in Docket No. CP89-460-000, and a certificate was issued to PGT in *Pacific Gas Transmission Company,* 56 FERC ¶ 61,192 (1991). The PG&E intrastate certificate application was considered by the CPUC in Application No. 89-04-033, and a certificate was issued to PG&E in CPUC decision ("D.") 90-12-119, *Re Pacific Gas and Electric Company,* 39 Cal.P.U.C.2d 69 (1990), LD, Ex. C.[1]

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[1] Petitioners failed to provide in their appendix true copies of the relevant CPUC decisions which were considered by the FERC and the D.C. Circuit in this case. For the Court's convenience, the CPUC will lodge with the Clerk the following documents, all of which are on file in the D.C. Circuit: (1) CPUC Mot. for Judicial Notice (Aug. 8, 1995); (2) Declaration of Counsel [Mark Fogelman] (Aug. 8, 1995), containing all relevant CPUC decisions as well as documents demonstrating that the instant petition raises claims that petitioners raised and lost on the merits in a final decision of the California Supreme Court; (3) CPUC Reply in Suppt. of Mot. for Judicial Notice (Sept. 1, 1995); and (4) Order Granting CPUC Mot. for Judicial Notice (Sept. 26, 1995). As herein used "LD" refers to the lodged documents and "LD, Ex. ___" refers to exhibits attached to the declaration of counsel which is one of the lodged documents.

The CPUC's Incremental Rate Policy

In 1990 the FERC granted optional certificates of public convenience and necessity to several applicants seeking to construct new competing interstate natural gas pipelines to serve California markets. These new pipeline projects were necessarily incrementally priced, *i.e.*, their rates were designed to recover the stand-alone cost of the new construction rather than "rolling-in" the cost of new facilities with the cost of existing facilities.

In February, 1990, the CPUC issued its Interstate Pipeline OII Decision, D.90-02-016, *Re Interstate Natural Gas Pipeline Supply and Capacity,* 35 Cal.P.U.C.2d 196, 110 P.U.R.4th 486 (1990), LD, Ex. A. In that decision, the CPUC found a need for additional interstate pipeline capacity to serve California markets and, attempting to harmonize its policies with those of the FERC, adopted a pro-competitive "let the market decide" policy for determining whether the CPUC should support or oppose the construction of new interstate pipeline proposals before the FERC. The decision established criteria which, if satisfied, would allow the CPUC to support new interstate pipeline applications before the FERC, and one such criterion was a requirement of incremental rates in order to ensure (1) that customers for whose benefit the costs of new construction were incurred would bear responsibility for those costs, (2) that there would not be overinvestment in new pipeline capacity and the consequent creation of stranded investment, and (3) that new capacity would be able to compete fairly with other new incrementally-priced capacity. *See* 35 Cal.P.U.C.2d at 213, 239, 240, 245, 247, LD, Ex. A; *see also* D.92-10-056, *Re Pacific Gas and Electric Company,* 46 Cal.P.U.C.2d 199, 204-209, 138 P.U.R.4th 105 (1992), LD, Ex. G.

On April 11, 1990, after PGT proposed that its initial rates for the PGT expansion would be based on an incremental cost allocation, the CPUC amended its intervention in the PGT expansion case before the FERC to indicate that PGT had satisfied the CPUC's criteria and that the CPUC supported the application.

The FERC's Attempts to Coerce Changes in the CPUC's PG&E Expansion Rate Structure

On December 27, 1990, the CPUC granted PG&E a certificate of public convenience and necessity to construct the PG&E intrastate expansion. *See* D.90-12-119, *Re Pacific Gas and Electric Company,* 39 Cal.P.U.C.2d 69 (1990), LD, Ex. C. The decision adopted a "pure incremental" method of cost allocation, concluding that "[c]osts of the Expansion Project will be recovered only from the Expansion's customers." *Id.* at 93. Attempting to protect the interests of captive customers who had no need for the PG&E expansion, the decision stated: "No costs of the Expansion will be allocated to PG&E's existing customers, except to the extent that PG&E itself is a customer of the Expansion Project." *Id.*

On January 22, 1991, the FERC issued its order in *Pacific Gas Transmission Company,* 54 FERC ¶ 61,035 (1991) ("January 22nd Order"), which required PGT to hold a new open season for the sale of expansion capacity. The decision found that there was language in PGT's tariff and precedent agreement relating to intrastate transportation on the PG&E system within California which "may be an illegal tying arrangement between interstate and intrastate transportation" and required PGT to exclude language concerning intrastate transportation from its tariff and agreement. 54 FERC at 61,156.

The FERC opined that rates for transportation on the intrastate PG&E expansion should be mileage-based rates rather than "postage stamp" rates – even though *all* rates established by the CPUC for intrastate transportation within California are postage stamp rates – stating that "there should be rates and additional delivery points available for shippers who desire some portion or all of their volumes to be delivered in Northern California before the gas reaches Kern River Station." *Id.*

On June 5, 1991, the CPUC issued D.91-06-017, *Re Pacific Gas and Electric Company,* 40 Cal.P.U.C.2d 497 (1991), LD, Ex. D. The decision changed the PG&E expansion's "pure incremental" cost allocation to an "allocated incremental" cost allocation, so that existing ratepayers would bear the cost of original facilities, incremental ratepayers would pay the cost of incremental facilities, and a portion of the cost of the original facilities would be allocated between existing and incremental ratepayers based on their relative usage of the expanded PG&E facilities. *Id.* at 502-503. The CPUC also clarified that its decisions do not "limit Expansion deliveries to a single delivery point" in California, *id.,* at 504-505, and rejected the notion that its incremental rate structure created an anticompetitive or unlawful tying arrangement. *Id.* The decision also established the so-called "crossover ban," requiring incremental PGT expansion shippers who transport incremental volumes of gas south from Malin on PG&E's system to pay the incremental PG&E expansion rate. *Id.* at 505-506.

On June 19, 1991, the CPUC issued D.91-06-053, *Re Pacific Gas and Electric Company,* 40 Cal.P.U.C.2d 628 (1991), LD, Ex. E. The decision reaffirmed the crossover ban, explaining that the purpose of this requirement was to preserve and to protect from erosion the CPUC's incremental cost allocation. *Id.*, at 632. The CPUC found that allowing

incremental PGT expansion shippers to use the existing facilities rate would result in "rolled-in pricing and a shift of risk to existing ratepayers." *Id.*

The CPUC also found that requiring incremental PGT shippers using the PG&E expansion to pay the postage stamp rate would not result in an unlawful tying arrangement because PG&E expansion shippers were free to deliver their gas anywhere in PG&E's service territory. *Id.* The CPUC also expressed its intention to modify its orders in a future proceeding so as to eliminate any double charge for intrastate mainline transportation. *Id.*, at 633, 634.

On August 1, 1991, in *Pacific Gas Transmission Co.*, 56 FERC ¶ 61,192 (1991) ("August 1st Order"), the FERC granted PGT a certificate of public convenience and necessity approving the FERC-jurisdictional leg of the PGT/PG&E Expansion Project. In the August 1st Order, the FERC repeatedly acknowledged that pursuant to the Hinshaw Amendment to the NGA, 15 U.S.C. §717(c), PG&E's rates, services and facilities are subject to the exclusive regulatory authority of the CPUC. It said: "Since the proposed PG&E facilities are intrastate facilities, the CPUC, rather than the Commission, has jurisdiction over those facilities." 56 FERC, at 61,684. It stated: "[W]e will not clarify or rule on the propriety of PG&E downstream services and rates, since PG&E is a Hinshaw pipeline and is regulated by the Public Utilities Commission of the State of California." *Id.*, at 61,699. And it further stated, quoting *Altamont Gas Transmission Co.*, 53 FERC ¶ 61,395 (1991), at 62,375: "PG&E is a 'non-jurisdictional local distribution company whose existing and planned expansion facilities are located entirely in the State of California, [and] is not required to file its related expansion application with the Commission.' " 56 FERC, at 61,712, fn. 76.

The FERC also found that the earlier-disapproved PGT tariff language relating to intrastate transportation south of Malin had been eliminated from PGT's tariff and precedent agreement, *id.*, at 61,721 and n. 115, and approved PGT's new open season as "fairly administered and comport[ing] with the purpose of an open season," *id.*, at 61,721.

Nevertheless, the FERC stated that it was "concerned about the existence of a tying relationship between transportation service north of Malin and transportation service south of Malin (including the postage [stamp] rate charged for such service)." *Id.* at p. 61,721. It reaffirmed its earlier determination of an unlawful tying arrangement, and found that the CPUC's crossover ban had exacerbated the tying arrangement "by requiring that expansion shippers on PGT must also use the PG&E expansion." *Id.*, at 61,725. It therefore concluded that "PGT may not initiate construction until the Commission is assured that the PGT shippers are receiving nondiscriminatory treatment as to access to the California markets by means other than on the PG&E expansion." *Id.*, at 61,726.

In particular, the FERC found fault with (1) the CPUC's allowance of duplicative backbone transmission charges which enabled PG&E to impose higher rates on Northern California shippers than on Southern California shippers, (2) the CPUC's postage stamp transportation rate, (3) the CPUC's selection of incremental rather than rolled-in pricing for the PG&E expansion, and (4) the CPUC's imposition of the so-called "crossover ban" – the feature of the CPUC's incremental rate design which is intended to ensure that the class of incremental customers for whose benefit the costs of the PG&E expansion were incurred bears responsibility for those costs. The crossover ban requires incremental PGT expansion shippers to pay the incremental expansion rate for intrastate transportation from Malin to points in California on the integrated PG&E system. While it does not deprive any shipper of

physical access to the PG&E system or of the ability to deliver its volumes at any point on the PG&E system, it does require the class of incremental customers for whose benefit the new facilities were constructed to pay the incremental cost of those facilities. 56 FERC, at 51,723-61,726.[2]

The FERC concluded that these features of the CPUC's intrastate rate orders were unduly discriminatory in that they constituted "an illegal tying arrangement," a "discriminatory [and] . . . anticompetitive . . . tying arrangement" and "discriminatory practices." *Id.* at 61,725-61,726. The FERC therefore imposed a condition on PGT's certificate requiring the CPUC to alter its intrastate rate structure to eliminate such discrimination before construction of the PGT expansion could begin. *Id.*, at 61,728. The FERC also stated that "without this condition, we could make no public convenience and necessity finding." *Id.*, at 61,726.

On August 20, 1991, the CPUC filed written comments responding to the construction condition and the FERC's underlying findings and conclusions. The CPUC stated in part:

> The CPUC respectfully submits that its interim rate determinations for PG&E's intrastate expansion facilities, including the "postage stamp" rate design and the "crossover" ban, are a legitimate exercise of the state's ratemaking authority. The CPUC also

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[2] The expanded PG&E pipeline is fully integrated. Molecules of gas transported on that line move through a single set of facilities. The question resolved by the CPUC's rate orders, then, is simply whether the cost of the expansion will be borne by incremental customers – for whose benefit the facilities were expanded – through incremental rates, or in part by existing captive customers – who had no need for the expansion – through rolled-in rates. For reasons exhaustively stated in its decisions, the CPUC chose the former.

> respectfully submits that the Commission, in utilizing its certificate conditioning power under the Natural Gas Act to compel a change in rates which the Natural Gas Act explicitly removes from the Commission's jurisdiction, is in excess of its lawful authority. Finally, the CPUC respectfully submits that the Commission's authority to determine whether the present or future public convenience and necessity requires the construction of a pipeline does not allow it to withhold a determination of the public convenience and necessity on the sole ground that rate determinations within the exclusive jurisdiction of a state are not consistent with the Commission's wishes.

The CPUC also stated its intention to eliminate the duplicative backbone transmission charges allowed under its then existing PG&E expansion rate structure and its willingness to reconsider on rehearing the issues of postage stamp rates, incremental rates and the crossover ban. *Id.*, at 7.

Thereafter on September 3, 1991, the CPUC timely filed its request for rehearing of the August 1st Order. The request for rehearing made clear that the CPUC was separately challenging *both* the construction condition *and* "the factual and legal determinations upon which that condition rests." *Id.*, at 1.

On September 6, 1991, the CPUC, taking official notice of the FERC's August 1st Order, granted expedited rehearing of D.91-06-017 and D.91-06-053, LD, Ex. F. This rehearing was as promised in the CPUC's August 20, 1991, filing before the FERC, and in its request for rehearing before the FERC. The CPUC's rehearing order granted an evidentiary hearing

on four rate issues related to the PG&E Expansion: (1) incremental vs. rolled-in pricing, (2) the crossover ban, (3) elimination of duplicative transmission charges, and (4) the postage stamp rate design. *Id.*, at 4-5.

On October 24, 1991, the FERC issued its order on report, *Pacific Gas Transmission Company*, 57 FERC ¶ 61,097 (1991) ("October 24th Order"). The October 24th Order stated that it did "not intend to intrude upon the CPUC's jurisdiction over the California gas market," *id.*, at 61,360, but reaffirmed its findings and conclusions of an unlawful tying arrangement and undue discrimination based upon the CPUC's postage stamp rate design and crossover ban. *Id.*, at 61,360-61,361. It did, however, eliminate the construction condition and substitute in its place a penalty on PGT's rate of return on equity "until such time that PGT demonstrates that neither its rates or transportation policies *nor those of PG&E* result in unduly discriminatory restraints on shippers' access to transportation on PGT's expansion project and *transportation service within California.*" *Id.*, at 61,360-61,361 (emphasis added).

On October 21, 1992, following a full evidentiary hearing and the issuance of an Administrative Law Judge's proposed decision, the CPUC issued its order on rehearing, D.92-10-056, *Re Pacific Gas and Electric Company*, 46 Cal.P.U.C.2d 199 (1992), LD, Ex. G. The CPUC's order thoroughly addressed the history and substance of the issues between the CPUC and the FERC, *id.*, at 204-209, concluding (1) that the PG&E expansion would continue to have incremental rates, *id.*, at 204-206; (2) that the crossover ban would continue to be enforced "to ensure that existing customers are not forced to pay for incremental facilities which are not being constructed primarily for their benefit" and that the ban did not constitute an unlawful tying arrangement, *see id.*, at 207; (3) that the CPUC's postage stamp rate design for the

expansion would continue, *id.*, at 208; and (4) that duplicative backbone transmission charges applicable to PG&E expansion customers would be eliminated, *id.*, at 208-209.

On March 16, 1993, the FERC issued its rehearing order, *Pacific Gas Transmission Company*, 62 FERC ¶ 61,243 (1993) ("March 16th Order"). While the March 16th Order acknowledged the results of the CPUC's rehearing in D.92-10-056, *id.*, at 62,618, it nevertheless reaffirmed its findings and conclusions of an unlawful tying arrangement and undue discrimination. *Id.*, at 62,618-62,619. In ruling on the CPUC's and other requests for rehearing, the FERC adhered to the rate of return penalty imposed in the October 24th Order. It stated as follows: "We recognize that the unduly discriminatory rate conditions are the product of rate and transportation policies subject to the jurisdiction of the CPUC. . . . Accordingly, we decline to dictate the form a remedy might take." 62 FERC, at 62,618. It further stated: "[W]e are deliberately not engaging in an effort to dictate or exercise veto control over intrastate rates and transportation policies. We do note in passing that the elimination of the unduly discriminatory conditions need not require removing the crossover ban. For example, mileage-based intrastate rates may ameliorate the constraints on open access imposed by the CPUC's current transportation policy, or, if gas volumes on PG&E's existing and expansion facilities are transported under a rolled-in rate, then the crossover ban would appear to be irrelevant." *Id.*, at 62,618, text and fn. 81.[3]

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[3] After correctly stating that "the crossover ban is no way connotes a limitation on a shipper's physical access to particular facilities," 62 FERC, at 52,618, the March 16th Order erroneously stated that under the CPUC's rate orders delivery of expansion volumes destined for northern California "would have to be scheduled via a semi-round trip, first south on PG&E's Expansion to its terminus at the Kern River Station, then back north on PG&E's existing facilities." *Id.* As the FERC was well aware, the CPUC

Private Parties' Attempts to Use the FERC's Findings and Conclusions to Coerce Changes in the CPUC's Rate Structure

On November 23, 1992, the Indicated Expansion Shippers, petitioners herein, sought rehearing of D.92-10-056, contending that the FERC's findings and conclusions of an unlawful tying arrangement and undue discrimination were correct and that the CPUC's rate structure had to be changed. LD, Ex. I. On February 3, 1993, the CPUC issued D.93-02-018, *Re Pacific Gas and Electric Company,* 48 Cal.P.U.C.2d 162 (1993), LD, Ex. H, denying rehearing of D.92-10-056. Then, on March 8, 1993, the Indicated Expansion Shippers petitioned for review of the CPUC's orders in the California Supreme Court, making the same arguments. LD, Ex. J and K. The petition for review was denied by the California Supreme Court on May 13, 1993, in California Supreme Court Case No. S031579. LD, Ex, L. The Indicated Expansion Shippers did not seek further review by filing a petition for certiorari in this Court.

Similar challenges to the crossover ban based on the FERC's findings and conclusions herein were made in PGT's Order No. 636 Restructuring Docket, Docket No. RP92-46-000. On July 12, 1993, in that docket, the FERC issued its PGT order on compliance with restructuring rule and related offer of settlement, *Pacific Gas Transmission Co.,* 64 FERC ¶ 61,052 at 61,448, 61,486-61,487 (1993) ("July 12th Order). In that Order, the FERC expressly rejected those

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had eliminated duplicative backbone transmission rates from its expansion rate structure. Moreover, the FERC itself has approved postage stamp rates on occasion. *See, e.g., Mobil Oil Corp. v. FERC,* 886 F.2d 1023, 1032 (8th Cir. 1989). The order also erroneously assumed that the CPUC had allocated rights to intrastate transportation capacity on the existing PG&E system. To date, the CPUC has not done so.

attacks but adhered to its earlier rulings. It said: "As previously discussed, the Commission has examined the issue of the 'crossover ban' in detail in several previous orders certificating PGT's Expansion Project and will not modify those conclusions here." *Id.*, at 61,487.

On March 18, 1993, three other expansion shippers filed a complaint with the FERC in *Suncor, Inc. v. Pacific Gas Transmission Company,* Docket No. CP93-260, based largely on the FERC's findings and conclusions herein. LD, Ex. M. The CPUC and other parties filed motions for summary disposition, and, on June 21, 1994, the FERC issued its decision in *Suncor, Inc. v. Pacific Gas Transmission Company,* 67 ¶ 61,352 (1994) ("Suncor Order"), dismissing the complaint. The FERC determined not "to revisit and modify our previous decision not to insist on removal of the crossover ban." *Id.*, at 62,226 (footnote omitted). The FERC stated that "the CPUC's action has mitigated, but not cured, the potential for its policies to cause PGT Expansion Project shippers to suffer undue discrimination in seeking access to PG&E's intrastate transportation services." *Id.* While letting its previous findings and conclusions stand, the FERC stated that it had "determined that enforcement of the crossover ban by itself need not result in discrimination that would unduly burden interstate commerce or violate the NGA," *id.*, at 62,227, and that "complainants have not shown that PGT's Expansion shippers will, in practice, suffer undue discrimination when seeking access to PG&E's facilities," *id.*, at 62,228. On July 20, 1994, the complainants filed a request for rehearing with the FERC, raising the same arguments predicated on the FERC's findings and conclusions herein. LD, Ex. N. The request for rehearing remains pending, and the FERC has indicated in a subsequent order that its rehearing order in *Suncor* will consider the validity of the crossover ban. *See*

Pacific Gas Transmission Co., 68 FERC ¶ 61,197, at p. 61,974 (1994).

On March 16, 1994, one of the Indicated Expansion Shippers filed an antitrust action against PG&E in the U.S. District Court for the Northern District of California in *Norcen Energy Resources, Ltd. v. Pacific Gas and Electric Company*, C-94-0911-VRW (N.D. Cal.), challenging the CPUC's postage stamp rates and the crossover ban and relying on the FERC's finding and conclusions herein. Complaint, at 27-29, Ld, Ex. O. On September 19, 1994, U.S. District Judge Vaughn R. Walker dismissed the complaint without prejudice, ruling that the crossover ban and postage stamp rates were immunized from the antitrust laws by the state action doctrine. Order Dismissing Complaint, at 17-19, LD, Ex. P. The Court also rejected the claim that the crossover ban constitutes an unlawful tying arrangement. *Id.*, at 34-35. On October 19, 1994, the plaintiffs filed an amended complaint. On July 27, 1995, the District Court dismissed the amended complaint, except for a few pendent state law claims.

Proceedings in the Court of Appeals

On August 8, 1995, the CPUC filed a substantial motion for judicial notice before the Court of Appeals, providing many pages of documentary evidence demonstrating the unsuccessful efforts of the Indicated Expansion Shippers and others to use the FERC's findings and conclusions below to coerce changes in the CPUC's PG&E expansion rate structure. The Indicated Expansion Shippers opposed the motion, and on September 1, 1995, the CPUC replied, making clear that one of the motion's primary purposes was to show that numerous parties to the proceedings, including the Indicated Expansion Shippers, had lost claims predicated on the FERC's findings and conclusions in collateral proceedings

which had become final. LD, CPUC Mot., at 2; CPUC Reply, at 3. The proffered documents included excerpts from the Indicated Expansion Shippers' application for rehearing, petition for review in the California Supreme Court and reply brief in the California Supreme Court, as well as the California Supreme Court's order denying review. LD, Ex. I, J, K, L. On September 26, 1995, the Court of Appeals granted the motion for judicial notice. LD, Order, D.C. Cir. Nos. 91-1369, *et al.* (Sept. 26, 1995).

In its respondent's brief in the Court of Appeals, the FERC admitted, as it had in its decisions, that its findings, conclusions and certificate conditions were intended "to *induce changes in PG&E's rates in accordance with the [FERC's] policies*." RB 19 (emphasis added).

The Court of Appeals thereafter determined that the FERC's findings, conclusions, and certificate conditions constituted an attempt "to do indirectly what the FERC cannot do directly" and improperly addressed matters that were "off-limits to the FERC." Pet. App. 16, 17. It granted PGT's petition for review and, "[b]ecause it granted [that] petition in sufficient part to give the CPUC *all the relief it seeks*," Pet. App. 10 (emphasis added), it dismissed the CPUC's petition as moot. Pet. App. 17. It also denied without comment "the petition filed by . . . the Expansion Shippers." Pet. App. 17.

The PG&E expansion's incremental rate structure, including the crossover ban and postage stamp rates, remains in effect.

ARGUMENT

I. None of the Considerations Warranting a Grant of Certiorari is Present in this Case

In a thoughtful and measured decision, the District of Columbia Circuit correctly determined that the CPUC may properly require and enforce incremental rates for an expansion of the facilities of a Hinshaw pipeline subject to its exclusive jurisdiction without significant gratuitous interference from the FERC, which is statutorily prohibited from regulating the rates, services and facilities of a Hinshaw pipeline. *See* 15 U.S.C. §717(c). The D.C. Circuit accordingly disapproved FERC findings, conclusions and certificate conditions, the sole purpose of which was, as conceded by the FERC, to " 'induc[e] a change [of state] policy beyond [its] jurisdictional purview.' " Pet. App. 13.

The decision of the D.C. Circuit is fully consistent with the relevant provisions of the Natural Gas Act and the decisions of this Court. *See, e.g.,* 15 U.S.C. §717(c); *General Motors Corp. v. Tracy,* 65 U.S.L.W. 4086, 4088 n. 3, 4093-94 (Feb. 18, 1997) (in rejecting Commerce Clause claim, the Court stressed "[t]he continuing importance of the States' interest in protecting the captive market from the effects of competition for the largest consumers"); *Sunray Oil Co. v. FPC,* 364 U.S. 137, 152 (1960) (the FERC may not use its certificate conditioning authority under the NGA to do indirectly that which it cannot do directly). Indeed, *Tracy* forcefully confirms the correctness of the D.C. Circuit's decision here. There the Court's discussion of "the importance of traditional regulated service to the captive market," 65 U.S.L.W. at 4093, makes it highly unlikely that FERC's intrusion on a State's incremental rate structure designed to protect captive customers would withstand scrutiny by this Court. *Tracy* breathed new life into cases such as *Panhandle*

Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951), *id.,* at 4094, 4095, it reserved judgment on the correctness of Court of Appeals decisions concluding that States are without authority to forestall or mitigate the adverse impacts on captive customers of LDC bypass, *id.,* at 4094 n. 14, and its reaffirmed the continuing vitality of the Hinshaw Amendment, *id.,* at 4088 n. 3, 4090. In the face of such a recent ruling, there is simply no need for this Court to consume its precious resources to review a Court of Appeals decision which is manifestly correct.

In addition, the D.C. Circuit's decision is not inconsistent with any decision of any other Circuit or any State court of last resort, and petitioners make no such claim. Moreover, their assertion that an intracircuit conflict exists between the Court of Appeals decision here and *United Distribution Companies v. FERC,* 88 F.3d 1105 (D.C. Cir. 1996), *petitions for cert. docketed,* Nos. 96-1186, 96-1187, 96-1188, 96-1189, 65 U.S.L.W. 3575-76 (Feb. 18, 1997), is unfounded and was decisively put to rest by the D.C. Circuit's order amending the *United Distribution Companies* decision on rehearing. *See* PGT Br. in Opp., App. B. Beyond these considerations, the facts of this case are complex and unique and have nothing to do with the interstate pipeline capacity release issues involved in *UDC.* Whatever action the Court takes with respect to the pending *UDC* petitions, it should deny certiorari in this case. This case presents no important question of law which has not been, but should be, settled by this Court.

II. Should the Solicitor General Take a Position Other Than That Certiorari Should Be Denied, the CPUC Reserves the Right to Respond in a Supplemental Brief

In the Court of Appeal, the CPUC and PGT argued that the FERC had gone too far. The CPUC challenged the FERC's findings and conclusions as impermissibly intruding on State jurisdiction. PGT argued that the FERC's imposition of a rate penalty certificate condition based on those findings was beyond its authority and in any event not rationally related to coercing a change in the CPUC's rate policies.

At the other end of the spectrum, the Indicated Expansion Shippers and others seeking to obtain lower rates by placing a greater rate burden on captive California customers who neither needed nor sought the expansion of PGE's state-regulated system argued that the FERC had not gone far enough. Those parties contended that based on its findings, the FERC should have altered the CPUC's rate policies directly.

In the Court of Appeal, the CPUC and PGT prevailed and all other parties, including the FERC, lost. Hence, the CPUC and PGT are the only true respondents – defending the decision of the Court of Appeal – before this Court.

After losing this case in the D.C. Circuit, the FERC and the Solicitor General did not petition for a writ of certiorari within the 90-day period following the denial of rehearing required by Rule 13 of this Court. Nor did they file a response supporting a grant of certiorari within the 20-day period following the docketing of the instant petition as required by Rule 12.6 of this Court. However, when questioned by the CPUC as to their position in this Court, the FERC and the Solicitor General have refused to state whether their position is other than simply contending that certiorari should be denied. Accordingly, the CPUC objects to any claim of the

FERC and the Solicitor General advocating a grant of certiorari or other argument that would alter the D.C. Circuit's decision in this case and reserves the right to respond to any such argument in a supplemental brief pursuant to Rule 15.8 of this Court.[4]

III. The Petition for Certiorari Is Barred in Any Event by the Doctrines of Res Judicata and Collateral Estoppel

The Indicated Expansion Shippers' petition for certiorari is barred by the doctrines of res judicata and collateral estoppel. Cal. Pub. Util. Code §1709 provides: "In all collateral actions or proceedings the orders and decisions of the [CPUC] which have become final shall be conclusive."

State and federal courts, including this Court, have frequently employed the principles embodied in this statute to bar state and federal court challenges to orders of the CPUC which have survived review by the California Supreme Court. *See, e.g., People v. Western Air Lines,* 42 Cal.2d 621, 630, *appeal dismissed,* 348 U.S. 859, 860 (1954); *Napa Valley Electric Co. v. Railroad Comm'n of California,* 251 U.S. 366, 371-373 (1920); *Southern Pacific Transp. Co. v. Pub. Util. Comm'n of California,* 716 F.2d 1285, 1289-1291 (9th Cir. 1983), *cert. denied,* 466 U.S. 936 (1984); *Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n of California,* 600 F.2d 1309, 1311-1312 (9th Cir.), *cert. denied,* 444 U.S. 920 (1979); *Consumers Lobby Against Monopolies v. Pub. Util. Comm'n,* 25 Cal.3d 891, 901 (1979) (recognizing the applicability of the doctrines of res judicata and collateral estoppel to federal court challenges to the orders of the CPUC).

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[4] The CPUC merely wishes to preserve its rights and is not contending that the Solicitor General is engaged in a collusive appeal.

A fundamental rule of our legal system is that "[a] final judgment on the merits of an action precludes the parties or their privies from litigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie,* 452 U.S. 394, 398, 401 (1981). Federal courts are specifically required to give the same preclusive effect to any statute or judicial decision of a State which would be given under the law of the State. *Migra v. Warren City School District,* 465 U.S. 75, 81 (1984); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982); *Allen v. McCurry,* 449 U.S. 90, 96 (1980); *see also Haring v. Prosise,* 462 U.S. 306 (1983). The Full Faith and Credit Statute, 28 U.S.C. §1738, codifies this principle. By that statute, Congress has mandated that full faith and credit be accorded to the statutes and judicial decisions of the States in order to promote comity within the federal system, prevent unnecessary litigation and conserve the resources of the federal courts. *Migra, supra,* 456 U.S. at 84.

Petitioners' arguments, rejected on the merits by the summary denial of their petition for review by the California Supreme Court, have been fully and fairly resolved adversely to petitioners. The California Supreme Court's denial of review constitutes a final court decision rejecting those claims within the meaning of §1738.[5] For this additional reason, the petition should be denied.

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[5] To the extent it might be argued that CPUC orders concerning the crossover ban constitute legislative rather than judicial determinations because they were made in the course of a ratemaking case, it has long been settled that the process of judicial review renders a ratemaking decision a "judicial" decision rather than a legislative determination for preclusion purposes. *See Detroit & Mackinac Ry. Co. v. Michigan Railroad Comm'n,* 235 U.S. 402, 406 (1914).

CONCLUSION

It is apparent that this case does not present one of the paramount statutory issues to be confronted by the Court this Term. The State of California's arduous six-year effort to defend its jurisdiction to protect captive customers from the coercive influence of the FERC's findings and conclusions is now entitled to finality. The petition for certiorari should be denied.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
MARK FOGELMAN*

Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992
*Counsel of Record

Attorneys for Respondent
California Public
Utilities Commission

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